Taos Ski Valley, Inc. ***and*** **Pavel M. Lukes.** Case 28–CA–14563

September 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 18, 1998, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and, as set forth below, has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order dismissing the complaint.

In adopting the judge's determination that the Respondent did not violate the Act when it failed to extend Pavel Lukes' employment for the 1997–1998 season,[1] we note that the judge stated that he found the General Counsel's case "tenuous at best" and had merely "assumed for decisional purposes" that the General Counsel had made a prima facie showing that the Respondent's decision not to rehire Lukes was motivated by his protected concerted activity. The judge determined that, although the Respondent was fully aware that Lukes had engaged in certain protected conduct, the timing of his termination was on the "outer cusp of significance" as related to his protected activities and, significantly, that the record is void of evidence of animus. Moreover, crediting the testimony of Respondent's president and general manager, Michael Blake, regarding the basis for not rehiring Lukes, the judge concluded that independent provocations, wholly separate from any protected conduct, motivated his decision not to reemploy Lukes. Thus, rejecting the General Counsel's contention that the Respondent's stated reasons for terminating Lukes were pretextual, the judge determined that the Respondent had met its *Wright-Line*[2] burden and dismissed the complaint.

In adopting the judge's dismissal of the complaint, we emphasize that the Respondent's stated basis for declining to bring Lukes back for another season—his continued obvious dissatisfaction and persistent complaints about the Respondent's temporary revocation of his son's ski pass—was credibly established and fully supported by the record evidence. Contrary to the General Counsel's arguments, Lukes' involvement in protected activities did not play any part in Respondent's decision. Instead, Lukes' relentless pursuit of this non-employment-related issue provided the impetus for his termination.[3]

It is undisputed that in late January, a lift operator revoked Lukes' teenage son's season lift pass for misbehaving in line. Lukes immediately and vigorously protested his son's treatment. A 2-week series of calls, letters, and meetings resulted in a temporary suspension rather than a revocation of the pass. Despite this apparent resolution, Lukes filed a civil complaint against the Respondent in early March, and followed up with an article in the local newspaper referencing the incident.[4] In early April, Lukes extended his quest regarding his son's treatment with a letter to the U.S. Forest Service, the Respondent's landlord. In mid-June, the Regional Forester forwarded to the Respondent, a copy of Lukes' letter. Blake testified that it was this letter, decrying the Respondent's treatment of its guests, which convinced him that Lukes was unable to let go of the ski pass incident and that there was no hope that they could reestablish a mutually satisfactory employment relationship. The letter clearly states that Lukes is not seeking the Forest Service's intervention with regard to his particular employment situation or to more general working conditions at the facility, but was a complaint and request for intervention over the Respondent's treatment of his son and other paying guests of the facility. This was a matter completely separate from and unrelated to Lukes' earlier protected activities on behalf of a union. Thereupon, some 5 months after suspending his son's pass, the Respondent reasonably determined that Lukes' implacability over the incident was incompatible with his continued employee status and decided not to offer him a position for the next season. Upon these facts, we find that the Respondent committed no unfair labor practice in terminating Lukes.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent operates a recreational ski facility located within a national forest area under the auspices of the U.S. Forest Service. Beginning in the fall of 1994, and for the next three ski seasons (late November to mid-April), Lukes was employed by the Respondent as a part-time ski instructor.

Unless otherwise noted dates refer to events occurring in 1997.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] There is evidence that Lukes' son receives at least a price reduction in his ski pass as an emolument of Lukes' employment. However, the General Counsel does not rely upon this or pursue it in an effort to show an employment nexus. Thus, we do not pass on this issue.

[4] Blake testified that he was not served notice of the legal proceedings and that he learned of the suit by reading about it in the newspaper.

Brendon Riley, Esq., for the Acting General Counsel.
Pavel M. Lukes, Pro Se, of Taos, New Mexico.
John A. Mitchell, Esq. (Mitchell & Mitchell), of Santa Fe, New Mexico, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case in Albuquerque, New Mexico, on April 13, 1998. Pavel M. Lukes (Lukes) filed the underlying NLRB charge on August 5, 1997,[1] and the Regional Director for Region 28 issued the complaint on September 26. The complaint alleges, in essence, that Taos Ski Valley, Inc. (Respondent or Company) violated Section 8(a)(1) and (3) of the Act by refusing to rehire Lukes for the 1997–1998 ski season.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I have concluded that the Acting General Counsel failed to prove that Respondent violated the Act, as alleged, based on the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a ski facility near Taos, New Mexico. During the 12-month period preceding the issuance to this complaint, Respondent's gross sales exceeded $500,000 and its direct inflow exceeded $2000. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it would effectuate the purposes of the Act for the Board to assert its statutory jurisdiction to resolve this labor dispute. I further find that Local Union No. 16, Laborers International Union of North America, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Relevant Facts

Respondent operates a recreational skiing facility and ski school on land situated in the Carson National Forest. The parents of Michael Blake, Respondent's current president and general manager, established the facility in 1955. Because of its location on public land administered by the U.S. Forest Service, Respondent must conduct its operations in accord with the terms and conditions set forth in the special use permits originally issued prior to the time Respondent established the facility. Consequently, Forest Service agents conduct regular safety and permit compliance inspections of Respondent's operations and also conduct an annual overall compliance evaluation.

Blake has overall responsibility for the facility's operations. Other key managerial personnel include Bill Etchemendy, the mountain operations manager; Max Killinger, the ski school director; and Ann McGee, the director of human resources. Respondent is a major employer in the Taos area. It employs in the neighborhood of 700 employees at the peak of the ski season (about Thanksgiving to mid-April) but only 80 to 90 employees work full-time on a year-round basis. None of Respondent's employees have ever been represented by a labor organization for collective-bargaining purposes and, according to Blake, Respondent has never before been involved in a labor dispute. Despite its size, Blake characterizes Respondent as a "family" operation as it has employed, in some cases, persons spanning three generations of local families.

Respondent provides skiing lessons for its customers through the Ernie Blake Ski School, named for Respondent's founder, and reputedly one of the more outstanding ski schools in the country if not the world. Killinger oversees the ski school operations. The school employs a group of supervisors, referred to in-house as "homeroom" supervisors, and well over 100 ski instructors. Although all of the instructors work on a seasonal basis, about 90 instructors work full time during the season and 20 to 30 more work on a part-time basis. The vast majority of the ski instructors return season after season. Typically, instructors desirous of work, the following season, assume that they will be recalled unless advised otherwise at the conclusion of the season.

Charging Party Lukes moved to the Taos area in 1994 and in short order, became a licensed real estate broker and building contractor. In the fall of 1994, Respondent hired Lukes as a part-time ski instructor. Lukes worked three consecutive seasons as a part-time instructor but on July 24, Blake advised Lukes that he would not be recalled for the 1997–1998 ski season. Respondent's motive for refusing to recall Lukes gives rise to the core issue to be decided here.

The General Counsel contends that Lukes' union and concerted activities motivated Respondent's adverse action against him. The undisputed evidence shows that Lukes, following informal discussions with several employees, telephoned several labor organizations in an effort to obtain information about organizing Respondent's ski instructors. Sometime in January, Arnold Vigil, the Union's agent in Albuquerque, agreed to assist Lukes in organizing the ski instructors. Between that time and early March, Lukes and Vigil conversed by telephone several times and finally concluded arrangements for Vigil to meet with the interested ski instructors at a location in Taos. Lukes concedes that he acted alone during these early telephone contacts with Vigil and that no one had knowledge of his efforts until early March.

In the meantime, Lukes became openly critical of Respondent's operations. Two incidental events precipitated Lukes' disclosure of his general disdain for the management style of Respondent's executives for Killinger. The first, and least significant event, occurred when a brief article about employee turnover appeared in the January 14 edition of *As the Bullwheel Turns (Bullwheel),* an employee newsletter prepared by McGee and distributed with the employee paychecks. In sum, McGee's article related that the number of returning employees had declined from approximately 90 percent in 1984 to a low of 60 percent in 1997. McGee attributed this decline to the increasing size of Respondent's workforce and "the changing demographics of Taos County." The article concluded by soliciting employee "thoughts" on this matter.

Lukes responded to the article by a letter dated January 21, a copy of which he also posted in the employee locker room.

[1] All dates refer to the 1997 calendar year unless otherwise indicated.

Lukes' letter took issue with McGee's "changing demographics." He argued that Respondent's management should examine itself for answers to the increasing turnover problem. He asserted that the rate of employee turnover "is commonly regarded in business circles as a good barometer of companies' management of human resources." He further argued that "high turnover . . . . ought to prompt a company to reflect upon it's [sic] self, it's [sic] management philosophy, structure and how that structure is staffed from the ground up." Lukes further asserted that a department-by-department examination of the turnover problem "will bring to light where there is a problem with the mid-level management and why." Finally, Lukes challenged Respondent, in effect, to survey other area employers to determine if they experienced similar turnover problems and suggested that at least one employer did not have that problem.

Blake conceded that Lukes' letter, in effect, struck a nerve in the executive suite. He claimed that he favored printing Lukes' response in the *Bullwheel* but "others" opposed doing so on the ground that the letter was "too contentious." Blake admittedly acceded to the wishes of those who opposed its publication including, undoubtedly, McGee. Although Respondent refused to publish the letter, there is no evidence showing that any manager or supervisor ever criticized the letter publicly or otherwise spoke to Lukes about its content or tone. However, Lukes claimed without contradiction that a ski school supervisor informed him about an inquiry from McGee concerning Lukes' value to the ski school shortly after he wrote this letter. Lukes interpreted McGee's inquiry as an indirect response to his letter.

The second and more significant event occurred 6 days after Lukes wrote his letter to McGee and its aftermath continued even beyond the time that Blake notified Lukes that he would not be recalled for his fourth season. On January 27, one of Respondent's ski lift operators seized the season pass of Lukes' 14-year old son Paul and ordered him off the slope immediately allegedly for misbehavior around a ski lift. According to Lukes, the ski lift operator unnecessarily removed the pass from Paul forcibly. Whatever the case, Mountain Operations Manager Etchemendy informed Lukes' son before he left the facility that his pass would be revoked for 2 weeks.

After hearing his son's account of the incident that evening, Lukes became indignant. The following day he went to Respondent's facility seeking to meet with both Blake and Etchemendy but both were unavailable. On January 30, Lukes called Blake's office and left a phone message but received no response. The following day Lukes faxed a letter to Blake recounting his several failed attempts to contact both Blake and Etchemendy, and demanding the "immediate return" of his son's pass. That same day Blake responded by a letter noting that Etchemendy had been prepared to meet with him the previous day and informing Lukes that following a review of "your son's case," Respondent found "no reason to return the pass at this time." On February 4, Lukes left a note with Ski School Manager Killinger recounting his unsuccessful effort to meet with Blake that day or the following day and requesting the opportunity to meet with Blake and Paul's "accusers eyeball to eyeball" the following Monday.

Lukes, his son, Blake, and Etchemendy all met in Blake's office on February 10. Lukes asserted that the seizure of his son's pass should not have occurred without some form of due process and consultation with him in his parental capacity. Blake asserted that the matter was strictly contractual requiring no due process. It further appears that Lukes' son provided his account of the January 27 incident and that either Blake or Etchemendy recounted the reports received from the ski lift operator and other employees about the events that day. Lukes questioned the absence of his son's accusers at the meeting and their accounts. By the conclusion of the meeting Blake agreed to review the matter one more time and advise Lukes of his decision in a couple of days.

Later that day, Lukes sent a lengthy letter to Blake further explaining his position and charging that "the man who removed [his son's] pass has fabricated [a] great majority of his 'story' subsequent to his actions in order to justify his inexcusable behavior." In order to resolve the divergent accounts of the incident, Lukes offered to pay for lie detector examinations of his son and the operator who seized the pass in order to prevent "an employee who lies and files false reports from becoming . . . . somewhat of a liability to [Respondent], if he has not already became one." Blake did not respond to this letter.

On February 12, Lukes wrote another letter to remind Blake of his promise to advise Lukes about the results of his further review in a couple of days. On February 14, Blake responded by fax, advising that Paul's pass would be returned on February 21 "subject to the condition that there be no further incidents." The fax further advised that Paul would be "welcome to purchase tickets in the meantime."[2]

Lukes received his annual performance review on February 19. Although instructor reviews appear to be a consensus evaluation of all supervisors, his homeroom supervisor met with Lukes to discuss the review. Lukes received below average ratings in three of the five review categories, an average rating in another category and an average to good rating in the remaining category. Because Lukes' failed to teach an expected number of classes, the principal criticism of his performance related to his motivation as an instructor. Even though Lukes' homeroom supervisor commented that the work he did do was satisfactory, he also added this observation: "Obviously it is hard to divorce problems with upper management from ski school—but you must try. We do not care about all that." Lukes conceded that this remark undoubtedly related to his support for his son rather than to any union or concerted activity as management would not have known of his protected activities at that time. For their part, Respondent's officials conceded that Lukes' review, though not stellar, would permit his recall.

On March 3, Lukes filed a civil complaint against Respondent in the Taos County Magistrate Court, claiming a breach of contract by virtue of the revocation of his son's season skiing pass without cause on January 27. Lukes sought $5000 in compensation for the monetary losses he and his son incurred,

[2] There is evidence that prior to this time Paul purchased a daily skiing ticket to ski with his sister, Andrea, but that he nonetheless was barred from skiing when he appeared at a lift.

and the emotional distress and loss of reputation caused by the revocation. Respondent, through its attorney, answered the complaint allegations, and filed a counter claim for $5000 in attorney's fees and costs for defending the suit. This matter lingered until December 23 when the magistrate judge granted Respondent's motion to dismiss without attorney's fees or costs.

That same day Lukes also posted and distributed flyers at Respondent's facility inviting Respondent's employees to a meeting on March 12 with Union Agent Vigil. Among other places, he posted copies in the employee locker room, on the bulletin board normally reserved for Respondent's notices to employees located adjacent to the time clock and elevator to the executive suite, on the windshields of automobiles in the parking lot, and at other places throughout the community. The flyers stated that "[t]ogether we can organize TSV employees in a labor organization which will represent us, and protect our dignity, interests and rights" and invited employees to telephone Lukes for further information. In addition, the flyer announced Lukes' appearance on a local radio program on March 28, invited employees to call in during that program and stated that "TSV, Inc. declined participation in the debate" on the radio. Lukes distributed and posted a similar flyer on March 12, the day of the meeting.

Both Blake and Killinger claim that they first learned of the nascent union activity from Lukes' March 3 notice. The notices posted on the Respondent's bulletin board near the timeclock were not removed. Neither Blake nor Killinger ever spoke with Lukes about the union organizing effort. Likewise, there is no evidence that any manager or supervisor ever spoke to any other employee about the flyers or any of the union activity. In fact, Blake claims that he instructed the supervisors and managers to listen to whatever an employee might say to them about the effort at union organizing but to express no opinions about the subject. However, Blake admitted that if he had known of it he would have been compelled to take action against Lukes for "papering" automobiles in the parking lot because of a strict Forest Service regulation prohibiting that activity by anyone.

On March 6, Lukes' pointedly critical guest editorial appeared in *The Taos News*, a weekly, general circulation. The newspaper serving the Taos area. Lukes' editorial charged that the morale of Respondent's employees was "at an all time low" because they were "fiscal hostages ruled and controlled through meager pay while in fear of being summarily dismissed without recourse." He then recounted that his "own troubles began" after responding to the article about employee turnover. The only response, he claimed was an inquiry about his value to the ski school, followed a week later by the suspension of his son's skiing privileges. Lukes reported that he filed a suit in magistrate court over the latter matter. He concluded by asserting that it was "time for the emperor to realize that he has no clothes" and for the employees to form "an organization which will stand up for dignity and respect" in order to "bring the mountain out of a coma induced by years of autocracy . . . . "

Although Blake admitted that he eventually studied the entire editorial, the matter of greatest importance to him on his first reading concerned the filing of the lawsuit. Blake asserted that, until he read about it in newspaper, he was unaware of the lawsuit as Respondent had not yet been served with a notice of the complaint. Hence, Blake took immediate steps to insure that Respondent's local attorney filed a timely answer in the ski pass case. According to Blake, he had learned through the local grapevine that Lukes had received a default judgment in another case unrelated to Respondent in circumstances suggesting that the complaint had not been served.

About 28 employees attended the March 12 meeting. Both Vigil and Lukes addressed those in attendance and answered questions. Union authorization cards were distributed. In addition, Lukes appeared on the local radio program mentioned in the flyer to promote the organizing project and, for a while, efforts were made to get additional cards signed following the meeting. However, Lukes conceded that this initial organizing effort failed to generate enough interest among employees to proceed further so he then began making inquiries about organizing with other unions representing employees at the Breckenridge and Vail ski resorts in Colorado. No evidence shows that Respondent's agents became aware of what occurred at the March 12 meeting or Lukes' subsequent activities. Blake even claims that he did not hear Lukes' guest appearance on the radio program.

At the conclusion of the ski season in April, no manager or supervisor gave Lukes any impression that he would not be recalled for the following season. In fact, Lukes received a letter, presumably sent to most other instructors, thanking him for his efforts during the past season and he subsequently received an invitation to Respondent's summer employee picnic that summer. In short, every indicator suggested that Lukes would be recalled.

In the meantime, Lukes wrote a letter dated April 4 to the Regional Forester complaining about Respondent's operation of the ski resort. Lukes asked the Forest Service to address Respondent's "long, self perpetuating autocratic pattern of behavior" during its "annual review process" and to insure that "safeguards i.e., due process, grievance, and appeal process etc. are mandated . . . . in the interest of protecting the public from arbitrary and unilateral actions by the abusive authority of your tenant." Lukes conceded that, to him, it was "not clear how your agency can assist employees with similar safeguards [but that] the employees have other means to seek protection against unfair and abusive management, which is being pursued as we speak." Lukes then recounted the story of his move to Taos, his employment with Respondent, and the fact that he had come to believe that Respondent's employees were "fiscal hostages . . . . . ruled and controlled through mediocre pay and fear of being summarily and brutally dismissed," all similar in tone and phrasing to his editorial in *The Taos News*. Thereafter, Lukes asserted his belief that his "troubles" began when he responded to the *Bullwheel* article and implied, at least, that Respondent retaliated against him for his criticism by revoking his son's ski pass. After detailing the ski pass matter at length, Lukes requested that the Regional Forester "address the issues raised in this letter" because his problem was "not an isolated incident, but merely the tip of an iceberg of a big problem with [Respondent's] conduct . . . . "

Although Lukes' letter to the Regional Forester indicates he copied "various individuals and organizations," no evidence shows that he sent a copy to Respondent. Instead, Respondent learned of the letter when it received a copy from the Forest Service sometime around the middle of June.[3] Blake regarded Lukes' letter to the Forest Service as the last straw. He wrote to Lukes on July 23 advising him that Respondent "will not offer you employment for the 1997–1998 season." Blake explained to Lukes only that this action was being taken because "[t]here appears to be no foundation upon which to build a mutually satisfactory employment relationship." At the hearing, Blake explained the basis for his decision as follows:

> Q. Mr. Blake, what involvement, if any, did Mr. Lukes' son's ski pass incident have in connection with the decision not to hire him for the '97/98 ski season?
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> A. *His—his behavior over that incident, his very angry behavior, [and] the fact that he would not let it go*, did in—did constitute or make up one element in the determi nation that he would not be hired for that season that you just referred to, '97/98.
>
> . . . .
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> JUDGE SCHMIDT: When you said there was one element, were there other elements?
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> THE WITNESS: Yes, sir.
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> JUDGE SCHMIDT: Can you put that in a nutshell? Well, what were they?
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> THE WITNESS: The other elements were the lawsuit. My personal belief is you don't—you don't sue your employer. I felt that was really significant. *If you can't work this out, you can't work it out, but you don't sue your employer,* and I—I don't separate his son from the fact that he's the one that sued us, asked for damages, so on.
>
> And, I have to tell you, we haven't reached it yet, but the straw that—for me that broke the camel's back was when he started the forest service's mule's tail about we weren't doing our job. We're very sensitive about that.
>
> The forest service is our landlord, and when you twist the old mule's tail and get them to go after us for something, *based largely on this incident that we were just talking about with his son*, the forest service can't do anything about employees, or your relations with your employees, any of those things. But they sure are your regulatory agency, and when you start going after them to take action against us, that was a major, major element for me. [Emphasis added.]

B. Further Findings and Conclusion

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by taking adverse actions affecting an employee's employment status for antiunion motives. *Consec Security*, 325 NLRB 453 (1998).

Under the causation test established by the Board in *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Where the General Counsel establishes a prima facie case, the burden of persuasion shifts to Respondent to establish that the same adverse action would have been taken even in the absence of the employee's protected activity. *Best Plumbing Supply, Inc.,* 310 NLRB 143 (1993). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

I have assumed for decisional purposes that the General Counsel met the burden of proving a prima facie case. However, I hasten to add that General Counsel's prima facie case is tenuous at best. Although Lukes clearly engaged in a considerable amount of high profile protected conduct well known to Respondent, the case is completely void of expressed animus on Respondent's part other than Lukes' eventual termination. Simply put, no evidence shows that any manager or supervisor spoke a single word to Lukes or any other employee related to any of the protected activity, which occurred here. Moreover, the complaint charges no independent violations of Section 8(a)(1) and the counsel for the Acting General Counsel conceded at the hearing that he had no such evidence. Although the Board can, and on occasion does, infer animus from the alleged discriminatory adverse actions alone, such cases almost invariably reflect that the unlawful conduct occurred close in time to either the commencement of the protected activity or the occurrence of some significant protected conduct. In my judgment, even the timing of Lukes' termination in relation to the bulk of his protected activity would be on the outer cusp of significance for purposes of ascribing an unlawful motive to Respondent.

As noted above, the *Wright Line* causation test requires that I assess and determine in this case whether Lukes' termination would have occurred even in the absence of Lukes' protected activity. Viewing this record stripped of Lukes' protected activity, I am convinced that he would have been terminated in any event. Lukes' concurrent activities on behalf of his son, while understandable conduct of a parent, simply does not fall within the scope of the Act's protection and the evidence here shows that those unprotected activities plainly played the most significant role in his termination. By first suing his employer for damages based on the ski pass incident and then complaining to the Forest Service, in effect Respondent's landlord and regulator, concerning its poor treatment of guests, in particular his son, Lukes unquestionably annoyed his employer enough to bring about his termination. This is especially true where, as here, Respondent felt that it had satisfactorily resolved the ski pass matter well before Lukes took both actions. I therefore credit Blake's unequivocal assertion that he would have termi-

[3] The copy of the letter in evidence (R. Exh. 34) bears the June 9 date stamp of the Regional Forester's office. The date of receipt reflected by the date stamp suggests, in the absence of any other explanation, that there may well have been a considerable delay between the time preparation of the letter commenced and the time Lukes mailed it.

nated Lukes in any event. In my judgment, the complete absence of any evidence that Respondent otherwise interfered with protected employee activity lends strong support to this conclusion. No basis exists to conclude, as General Counsel asserts, that Lukes' termination because of his persistent pursuit of the ski pass matter is a pretext designed to mask an unlawful motive. For these reasons, I will recommend dismissal of this complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Acting General Counsel failed to prove that Respondent violated the Act as alleged in the complaint and notice of hearing dated September 26, 1997.

On these findings and conclusion sof law, and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

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[4] If no exception s are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. All pending motions inconsistent with this recommended Order are denied.